**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| INSTITUTE OF IMAGINAL STUDIES, INC.,<br>Plaintiff and Appellant,<br>v.<br>INSTITUTE OF NOETIC SCIENCE, (IONS),<br>Defendant and Respondent. | A146122<br><br>(Marin County<br>Super. Ct. No. CIV1104274) |

The Institute of Imaginal Studies (IIS) sued the Institute of Noetic Science (IONS) after a proposed business and real estate deal between the two failed. Two misrepresentation causes of action were dismissed as time-barred following a demurrer, and two contract-based claims were rejected on the merits following a court trial. IIS claims that it should have been allowed to proceed on its two misrepresentation causes of action and that the trial court erred in finding in IONS's favor on the contract causes of action. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

*A. The Parties and the Letter of Intent*

The following facts are taken from the trial court's statement of decision entered following a bench trial. IIS is a for-profit corporation that operates Meridian University.

IONS is a nonprofit organization devoted to the study of noetics,[1] and it owns 194 acres of rural property in Petaluma.

IIS lacked a permanent campus for its university, and it approached IONS about purchasing its property. From September 2006 to August 2007, the parties negotiated proposals that would have resulted in them jointly owning the property. As these negotiations progressed, the parties entered into three letters of intent. The first two expired. The third was signed on June 20, 2007. This letter of intent was conditioned on the approval of the board of directors of both organizations, and both boards subsequently approved it.

This letter of intent consisted of 14 sections on four pages. Under it, IIS was to purchase a 50 percent interest in IONS's property. IIS was to place $1 million in escrow by the end of June 2007, and then another $500,000 before closing. IIS was also to assume IONS's $3 million mortgage on the property, with closing conditioned upon the mortgage holder's approval. In furtherance of these terms, IIS deposited $1 million into an escrow account.

The parties' goal was to create a "transformative learning center" by repurposing a retreat center on the property into a campus and place for study in the "fields of spirituality, science, ecology, education, transformational psychology[,] and socially responsible business." The parties proposed to jointly own and operate the property's existing facilities. They also proposed, but were not obligated to commence, a $3 million development project, with any costs in excess of $3 million to be funded by jointly raised donor contributions or by the inclusion of additional equity partners. A new entity, "NewCo," was to be created to oversee the property's operations, but the letter of intent left for further discussion the details about NewCo's legal structure and governance. The parties agreed that the deal's complete terms would be set forth in a definitive final agreement to be executed by July 16, 2007, and that final execution would not be subject

[1] Noetic is defined as "of, relating to, or based on the intellect." (Webster's 11th New Collegiate Dict. (2003) p. 840.)

to the approval of either organization's board of directors. Until July 16, 2007, neither party could, without consent of the other, solicit or consider alternative proposals from other parties.

The parties continued to engage in lengthy negotiations to reach a final agreement, but they eventually reached an impasse regarding the legal structure of NewCo and how the property would be owned by IIS. These issues were crucial because IONS needed to maintain its tax-exempt status, and IIS needed to maintain a certain asset/liability ratio for accreditation. Early in the parties' discussions, IIS told IONS that it would consider converting to non-profit status. But after executing the letter of intent, IIS refused to convert to a non-profit and proposed that NewCo be a for-profit company. IONS hired outside counsel to offer a solution to the impasse, but IIS rejected the proposal.

Meanwhile, before a final agreement was agreed upon or signed, IIS publicized that it was an owner of the property. It also distributed an informational flyer to prospective and current students scheduling classes at the property.

Because of the difficulties in agreeing on the property's title and NewCo's structure, the parties extended the deadline to complete the final agreement to August 3, 2007. After this date passed, the parties nevertheless continued to negotiate even as IIS grew increasingly desperate to begin the fall term.

On August 10, 2007, at an IONS membership convention, a group of individual members of IONS's board met separately. By this time, IIS's principal had gained a reputation for being unreasonable, unrealistic, and difficult. At the meeting, several of the individual board members pledged $3.1 million to IONS.

On August 25, 2007, IIS wrote to IONS and proposed to pay any and all taxes incurred as a result of IIS's for-profit status. Three days later, on August 28, IONS notified IIS that further negotiations were no longer an option, and the next day released the $1 million in escrow back to IIS. About a week after that, IIS informed its alumni and students about its loss of a permanent campus. IONS subsequently accepted its board members' pledges of $3.1 million.

Two years later, in 2009, IONS and IIS began discussing a rental agreement for IONS's retreat center on the property. After protracted negotiations, the parties entered into an agreement for the 2010-2011 and 2011-2012 academic years.

*B. The Instant Action*

On August 26, 2011, IIS filed a complaint against IONS that alleged causes of action for (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) intentional misrepresentation, (4) negligent misrepresentation, and other causes of action not at issue in this appeal. Following two demurrers, the trial court allowed the contract-based claims to proceed but sustained the demurrers on the misrepresentation causes of action with leave to amend.

IIS thereafter filed a second amended complaint, which is the operative complaint. In it, IIS alleged that IONS breached an enforceable contract, i.e., the letter of intent, and breached the implied covenant of good faith and fair dealing by securing $3.1 million in pledges from its board members. IIS also alleged that IONS misrepresented that IIS could be a partner notwithstanding its for-profit status, that IONS would prepare a final agreement by August 1, 2007, that tax issues related to IIS's for-profit status were an impediment to the deal, and that IONS would sell a portion of the property to IIS. IIS asserted that it did not discover the falsity of these misrepresentations until March 2011, when it found emails by associates of IONS that discussed the $3.1 million in pledges and circumstances that caused the deal to fail.

The trial court again sustained a demurrer, this time without leave to amend, to the causes of action for intentional misrepresentation and negligent misrepresentation on the basis that they were time-barred. It found that IIS's general allegations of delayed discovery did not overcome the specific allegations demonstrating that, even if it was unaware of all the facts concerning IONS's motives in backing out of the deal, IIS knew or should have known of its injury and the falsity of the representations by August 28, 2007.

The case proceeded to a bench trial on IIS's claims for breach of contract and breach of the implied covenant of good faith and fair dealing.[2] Afterward, the trial court issued a statement of decision finding that the letter of intent was not an enforceable contract. The court found the letter of intent was an agreement to agree, insufficiently certain, and lacked mutual consent on essential terms. Alternatively, the court ruled that, even if the letter of intent was a contract, IIS had failed to sustain its burden of proving satisfaction of a condition precedent to its enforceability: the term requiring that the mortgage holder approve IIS's assumption of the mortgage. Finally, the court ruled that IONS acted in good faith. The court entered judgment in favor of IONS.

## II. DISCUSSION

### *A. The Ruling on the Demurrer.*

We first consider whether the trial court erred in sustaining IONS's demurrer to IIS's causes of action for intentional misrepresentation and negligent misrepresentation.

[2] The trial also resolved IIS's remaining claims and cross-claims brought by IONS. The rulings on these claims are not at issue in this appeal, as the parties have not challenged them.

1. The Applicable Legal Standards.

The rules governing our review of the trial court's ruling on demurrer are well settled. We review de novo an order sustaining a demurrer and exercise our independent judgment to determine whether the complaint "state[s] a cause of action on any available legal theory." (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279.) We accept the truth of all well-pled allegations in the complaint but not that of " ' "contentions, deductions or conclusions of fact or law." ' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) When the trial court sustains a demurrer without leave to amend, we review whether the determination that " 'no amendment could cure the defect in the complaint' " was an abuse of discretion. (*Brown, supra*, 247 Cal.App.4th at p. 279.) We reverse only if there is " 'a reasonable possibility that the plaintiff could cure the defect by amendment.' " (*Ibid*.) IIS bears the burden of showing a reasonable possibility of curing the defect. (See *ibid*.)

2. IIS's Misrepresentation Claims Are Time-Barred.

As we have mentioned, IIS's second amended complaint alleged that IONS made the following misrepresentations: (1) that IIS could be a partner notwithstanding its for-profit status; (2) that IONS would prepare a final sale agreement by August 1, 2007; (3) that tax issues related to IIS's for-profit status were an impediment to the deal; and (4) that IONS would sell a portion of the property to IIS. IIS alleged that the misrepresentations were made, and that its injury occurred, by August 29, 2007, when the deal fell through and escrow was canceled.

A three-year statute of limitation applies to IIS's intentional misrepresentation claim (Code Civ. Proc., § 338, subd. (d)), and a two-year statute of limitation applies to its negligent misrepresentation claim (Code Civ. Proc., § 339). (See also *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.) Since IIS did not file suit until August 26, 2011, about four years after the deal collapsed, its claims are therefore time-barred unless the discovery rule applies.

The discovery rule is an exception to the general rule of when a cause of action accrues. It postpones accrual "until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) The rule delays accrual only until the plaintiff has, or should have, inquiry notice of the cause of action. (*Ibid.*) "[S]uspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period." (*Ibid*.) "Elements" of a cause of action refer to the "generic" elements of wrongdoing, causation, and harm. (*Ibid.*) "Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Ibid.*)

To benefit from the discovery rule, a plaintiff must allege facts to support its application. A plaintiff whose complaint shows on its face that a claim is time-barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence. (*CAMSI IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1536 (*CAMSI IV*).) The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer. (*Id.* at pp. 1536-1537.) Put more directly, a plaintiff must allege that he or she conducted a "reasonable investigation after becoming aware of an injury" and cannot passively sit on the problem. (*Fox*, *supra*, 35 Cal.4th at p. 808.) The question of when a plaintiff reasonably should have discovered facts for purposes of the discovery rule is properly decided as a matter of law if the complaint's allegations support only one reasonable conclusion. (*CAMSI IV*, *supra*, 230 Cal.App.3d at p. 1538.)

IIS argues that the discovery rule postponed accrual of its claims until March 2011, when it learned of the falsity of IONS's misrepresentations in emails it found that discussed the monetary pledges by IONS's board members. In response, IONS contends that the allegations of the second amended complaint demonstrate that IIS suffered injury and either was or should have been aware of the purported falsity of the representations by August 28, 2007. We agree with IONS.

Regarding IONS's alleged representation that IIS did not need to be a nonprofit, the allegations assert that IONS insisted on July 6, 2007, that IIS convert to a non-profit, and they assert that IONS cited IIS's for-profit status as a reason for rescinding the letter of intent. IIS conceded that it found IONS's insistence on non-profit conversion to be "startling, puzzling and concerning," and it conceded that it was "[s]haken by the bait and switch."

Regarding IONS's other alleged representations, the allegations in the second amended complaint demonstrate that IIS knew of, or should have suspected, their falsity by the time the deal failed. IIS alleged that IONS "deliberately and repetitively blocked IIS's efforts to close the sale," and that IONS failed to send a complete sale agreement by August 1, 2007. According to the allegations, even though IIS offered to pay all taxes associated with its for-profit status on August 25, 2007, IONS responded a couple of days later "stating that even with IIS paying any and all taxes, that IONS would not go through with the sale, citing a 'mutual mistake' and 'rupture in our institutional relationships and the break down of trust.' " Escrow was cancelled on August 29, 2007, and days later IIS acknowledged its loss of a permanent campus. IIS alleged that after the deal fell apart, it repeatedly "sought to understand the true facts behind [IONS's] failure to follow through with the sale." The only reasonable conclusions that can be drawn from these allegations are that by August 28, 2007, IIS knew of its injury, suspected wrongdoing by IONS, and knew or had reason to know that IONS had made false representations. Contrary to IIS's counsel's suggestions at oral argument, these conclusions are not undermined because IIS may not have known until a later date that individual IONS board members pledged $3.1 million to IONS at the August 10, 2007 meeting.

IIS argues that its claims are timely under the reasoning of *Brandon G. v. Gray* (2003) 111 Cal.App.4th 29 (*Brandon G.*) and *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471 (*Magpali*). Its reliance on these authorities is misplaced. In *Brandon G.*, plaintiff parents investigated a daycare facility before enrolling their children and were told by county officials that no complaints had been made about the facility. (*Brandon G.*, at p. 32.) The plaintiffs enrolled their children, one of whom later reported being molested at the center. (*Ibid.*) About a month after the report, the parents read a newspaper article about complaints regarding the daycare facility, and they went to the county to look at its files, which revealed (contrary to what they had been told) that there were a number of complaints against the facility that predated county officials' statements to them. (*Id.* at pp. 32-33.) They later a brought a legal malpractice action against the attorneys they hired based on the attorneys' late filing of claims against the county. The malpractice action turned on whether the parents' underlying claim against the county accrued when plaintiffs found out about the molestation or when they reviewed the county files containing complaints against the daycare facility. This court found that the claim accrued when plaintiffs reviewed the files. (*Id.* at pp. 32-33, 34-36.) "[A] cause of action for fraud 'is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' In a case such as this, that date is the date the complaining party learns, or at least is put on notice, that a representation was false." (*Id.* at p. 35.) In *Brandon G.*, the plaintiffs had no reason to suspect that county officials' statements to them were false until they read newspaper articles with contrary information, whereas here IIS had reason to suspect the falsity of the representations when its deal with IONS fell through.

The court in *Magpali*, *supra*, 48 Cal.App.4th 471, found that a plaintiff's claims for fraud accrued when he had sufficient reason to suspect the representations at issue were false. In *Magpali*, plaintiff claimed he was induced to work for defendant based on defendant's representation that he could sell insurance to any ethnic group. Plaintiff's employer later informed him he could no longer sell insurance only to Filipino and Hispanic communities. Plaintiff sued for fraud more than three years later. The court found that plaintiff's claim was time-barred because plaintiff had sufficient reason to suspect defendant's representation was false when he was told he had to change his sales practices. (*Id.* at pp. 483-485.) As did the plaintiffs' claims in *Magpali* and *Brandon G.*, IIS's claims accrued when it was put on notice of the falsity of the representations, not when it learned of additional motives for them. IIS was put on such notice on or before August 28, 2007, the date by which it was clear that the deal had collapsed.

We also reject IIS's argument that its subsequent conduct and renewed relationship with IONS from 2009 through 2011 excused late discovery. IIS alleges that after the 2007 deal fell through, it repeatedly sought to discover the true facts behind IONS's refusal to go forward with the sale. But, other than the allegation that IONS's Executive Chair of the Board refused a meeting in March 2011, IIS does not plead specific facts detailing any inquiry. Conclusory allegations of diligence are insufficient. (See *CAMSI IV, supra,* 230 Cal.App.3d at pp. 1536-1537.) As to its resumed interaction with IONS, IIS began discussions with IONS in April 2009 that led to IIS leasing space at IONS's retreat center from 2010 to 2012. IIS maintains that this added to its inability to discover fraud, but it does not allege that IONS ever spoke to anyone at IIS about the events of 2007 after April 2009. IIS thus does not provide any factual support for its position that the renewed interaction somehow prevented IIS's discovery of fraud. Stated simply, IIS failed to plead facts showing that, after being put on notice of injury and wrongdoing, it undertook a reasonably diligent investigation that excused late discovery.

Finally, the trial court was not obligated to allow a further amendment of the complaint. IIS did not explain to the trial court how further amendment would enable it to satisfy the discovery rule, nor has it done so in its appellate briefing. In order to receive yet another opportunity to amend, IIS was required to be explicit on how it could cure the deficiencies of the second amended complaint. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) It has provided no such explanation.

*B. The Trial Court Did Not Err When It Ruled on the Contract Causes of Action.*

After the bench trial, the trial court found that the letter of intent was not an enforceable contract, and it therefore rejected IIS's causes of action based on breach of contract, including the claim for breach of the implied covenant of good faith and fair dealing. IIS contends that the court erred, and it urges us to review the decision de novo, framing the issue as whether the letter of intent is sufficiently certain to be enforced. IONS, in contrast, contends that the court's determination that the letter of intent was not an enforceable contract was a question of fact, which should be reviewed for substantial evidence. We first consider the court's factual finding that there was no mutual consent between the parties.

1. The Applicable Legal Standards.

" ' "[W]here the existence and not the validity or construction of a contract or the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury or other trier of the facts to determine whether the contract did in fact exist." ' " (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 (*Alexander*).) "Mutual assent or consent is necessary to the formation of a contract," and "[m]utual assent is a question of fact." (*Ibid*.) Here, the parties presented conflicting evidence and conflicting inferences could be drawn from the evidence as to whether an enforceable contract existed.

As a result, we must uphold the trial court's finding of fact if supported by substantial evidence. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208, *Winograd v. American Broadcasting Co*. (1998) 68 Cal.App.4th 624, 632.) Substantial evidence is evidence of " ' "ponderable legal significance," ' " 'reasonable in nature, credible, and of solid value" ' " (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, italics omitted.)

" 'Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties.' " (*Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1562, superseded on another ground by Business and Professions Code, § 650, subdivision (b) as stated in *Epic Medical Management, LLC v. Paquette* (2015) 244 Cal.App.4th 504, 516.) "Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense." (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358-359.) Objective intent, not the parties' subjective intent, governs our interpretation. (*Beck*, *supra*, 211 Cal.App.3d at p.1562.) Where the evidence shows the writing was not intended to be binding until a formal written contract is executed, there is no contract. (*Banner Entertainment, Inc.*, *supra*, 62 Cal.App.4th at p. 358.)

2. Substantial Evidence Supports the Trial Court's Finding that the Parties' Lacked Mutual Consent.

Substantial evidence supports the trial court's ruling that the parties did not intend for the letter of intent to be a final, binding agreement. To begin with, the terms of the letter of intent indicate that the parties did not intend to permanently bind themselves until they executed a final agreement. The first sentence states the parties will sign a final agreement at a later date. Section 12 entitled, "Negotiation of Final Agreement," provides almost a month to negotiate and sign that final agreement. The letter of intent concluded by stating that, barring material unforeseen events, the parties would "memorialize the forgoing points in a definitive agreement and execute said agreement no later than July 16, 2007." The parties thus expressly reserved execution of a binding, "definitive agreement" for the future. In addition, the "Control & Management" section, which discusses how the parties will govern the property after the close of escrow, specifically provides it is "subject to amendment."

Extrinsic evidence also supported the trial court's ruling. As the trial court noted, after the parties executed the letter of intent, they spent two months in time-consuming negotiations over the terms of a final agreement. Their correspondence shows that they both considered a final agreement necessary to close the deal.

Contrary to IIS's argument that the letter of intent constitutes an enforceable land-sale contract, evidence shows the parties contemplated a joint venture with both a land-sale component and a management-and-development component. IIS conceded there was to be a "joint venture" whose vision was "to develop a transformative learning center for two or more equity partners." Upon closing, the parties were to "jointly own and operate the land, all existing improvements, and the prospective Project." Moreover, the letter of intent included no address or legal description of the land, referring to only a "194 acre property." IIS contends extrinsic evidence can cure this deficient property description for purposes of the statute of frauds, but, coupled with evidence establishing the broad scope of the parties' proposed deal, the letter of intent's lack of property description supports the conclusion that the parties did not intend to create a binding land-sale contract through the letter of intent alone.

The trial court also found that the letter of intent lacked essential details regarding the management and potential development aspects of the joint venture. The letter of intent mentions a "Governing Board of New[C]o" that would approve additional improvements and projects. The governing board was to set hospitality-service rates and a profit-sharing formula, address market pricing and discounted pricing for equity owners, make management and staffing decisions, and make decisions regarding IIS's use of certain existing facilities. The governing board was also to control management of the campus and property after the close of escrow. Extrinsic evidence confirmed that the parties understood this governing board would be that of NewCo, which would be created to manage the property.

The terms of NewCo's creation and governance were left undecided. IIS's principal testified that the parties agreed NewCo would be a partnership, limited-liability company, or a non-profit, and IIS proposed that NewCo be a limited-liability company. Contrary evidence showed that IONS expressed serious concerns about jeopardizing its non-profit status and wanted NewCo to be a non-profit. IONS hired a law firm to propose an acceptable legal structure for NewCo, which IIS ultimately rejected. The trial court found IIS's claim that it did not understand that IONS needed NewCo to be a nonprofit "troubling," and ultimately found no meeting of mind on the matter. Both parties considered NewCo's legal structure to be vital, and they both agreed the issue must be settled before they executed a final agreement. The parties continued to negotiate NewCo's governance after the letter of intent was executed. Substantial evidence supports the trial court's finding of lack of mutual consent to material contract terms.

IIS urges us to reach an opposite conclusion, pointing to both boards' approval of the letter of intent, the lack of need for board approval to execute a final agreement, the escrow deposit, and IIS's advertising of its new campus. But regardless of conflicting evidence or inferences, our inquiry ends with a conclusion that substantial evidence supports the trial court's factual determination. Because we conclude that substantial evidence supports the court's finding that the parties lacked mutual consent, we do not reach the questions of whether the letter of intent is sufficiently certain to be enforced or whether IONS's performance was excused because of the non-occurrence of a condition precedent, i.e., the failure of the property's mortgage holder to approve IIS's assumption of the mortgage.

3. The Trial Court Properly Rejected IIS's Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing.

The final issue is whether the trial court properly rejected IIS's claim that IONS breached the implied covenant of good faith and fair dealing by violating the letter of intent's exclusive-negotiation provision. The trial court found that IONS acted in good faith in the 2007 negotiations. This factual determination is also reviewed for substantial evidence. (See *Winograd v. American Broadcasting Co., supra,* 68 Cal.App.4th at p. 632.) But we may affirm on any ground supported by the record. (*Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1072.) We uphold the trial court's ruling here because IONS did not have an express or implied contractual obligation to negotiate exclusively with IIS on the date of the alleged breach.

The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 683-684, 689-690.) "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." (*Id.* at p. 690.) "There is no obligation to deal fairly or in good faith absent an existing contract." (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.) Stated otherwise, the law imposes no obligation to bargain for a contract in good faith in the absence of a preexisting agreement, statute, or a promise and reliance sufficient to support a promissory-estoppel claim. (*Ibid*.)

IIS's argument relies solely on Section 12 of the letter of intent, which required the parties to negotiate exclusively while the letter of intent was effective. IIS's theory is that IONS violated the implied covenant of good faith and fair dealing through secret negotiations that occurred at the August 10, 2007 meeting, in which several individual IONS board members pledged $3.1 million to IONS. But under Section 12, the exclusive-negotiation obligation and the deadline to execute a final agreement terminated first on July 16, 2007, and then by extension on August 3, 2007. Because Section 12 did not require IONS to exclusively negotiate with IIS on August 10, 2007, IIS cannot prevail on a claim that IONS violated the implied covenant of good faith and fair dealing for allegedly failing to do so.

## III. DISPOSITION

The judgment is affirmed.

Humes, P.J.

We concur:

Margulies, J.

Kelly. J.*

*Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.